

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)

Federal Communications Commission
Office of Secretary

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Amendment of Section 73.606(b),
Table of Allotments,
TV Broadcast Stations
(Mililani Town, Hawaii))

)
)
MM Docket No. 96-136
RM-8816
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To: Chief, Allocations Branch

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COMMENTS IN OPPOSITION TO NOTICE OF PROPOSED RULE MAKING

Irwin, Campbell & Tannenwald, P.C., on behalf of one of its broadcast clients ("IC&T"), and pursuant to Section 1.415(a) of the Commission's Rules, 47 C.F.R. § 1.415(a), respectfully submits these Comments in Opposition ("Comments") to the Notice of Proposed Rulemaking¹ in the above-captioned matter. In the NPRM, the Commission requested comments on the proposed allotment of UHF Television Channel 60 to Mililani Town, Hawaii, in response to a petition for rulemaking (the "Petition") filed by James Boersema.

IC&T requests that the Commission dismiss or deny the Petition as moot or as not warranting consideration pursuant to Section 1.401(e) of the Commission's Rules, 47 C.F.R. § 1.401(e), since even if Channel 60 at Mililani Town is added to the Table of Allotments, parties will not be able to file applications and competing applications for the new vacant allotment, due to the freeze on such applications recently imposed by the Commission in the Digital Television

¹ Amendment of Section 73.606(b), Table of Allotments, TV Broadcast Stations (Mililani Town, Hawaii), MM Docket No. 96-136 and RM-8816, Notice of Proposed Rulemaking, DA 96-947 (released June 21, 1996)(the "NPRM").

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Proceeding.² Accordingly, since interested parties will not be able to file applications even if the Commission were to allot Channel 60 to Mililani Town, the Petition is moot and does not warrant consideration, and should be dismissed or denied, thereby conserving valuable Commission resources. In support of its opposition to the proposed allotment of Channel 60 to Mililani Town, IC&T submits the following:

I. IC&T Has Standing To File Comments In Opposition To The NPRM

Any "interested person" may file comments in support of or in opposition to a notice of proposed rule making. See 47 C.F.R. § 1.415(a). The Commission has expressly ruled that law firms filing on behalf of unidentified clients are "interested persons" entitled to file such comments, in keeping with its policy of considering all timely-filed comments from any person whatsoever in a rule making proceeding, as contrasted with adjudicatory proceedings where pleadings may only be filed by "parties in interest." See Television Channel Assignments, 53 RR 2d 53 (Policy and Rules Division, 1983). Accordingly, IC&T is properly entitled to file these Comments, subject only to the prerequisite of timeliness.

² See News Release, Report No. DC 96-71 (released July 25, 1996)(the "Freeze News Release"). In the Freeze News Release, the Commission announced the adoption of a Sixth Further Notice of Proposed Rule Making (the "Sixth FNPRM") in the digital television proceeding, Advanced Television Systems, MM Docket No. 87-268, FCC 96-317 (adopted July 25, 1996)(the "Digital Television Proceeding"). As of the date of filing of these Comments, the text of the Sixth FNPRM has not been released. In connection with the adoption of the Sixth FNPRM, the Commission imposed a freeze on the filing of applications for new analog National Television System Committee ("NTSC") television stations. See Freeze News Release at 3.

II. The Application Filing Freeze Renders The Petition Moot

In the Digital Television Proceeding, the Commission is considering the adoption of a digital television channel allotment plan which will accommodate providing a second channel to all existing eligible broadcasters operating on analog NTSC channels, while minimizing interference and concentrating all operations within a core spectrum area to maximize spectrum efficiency and reclaim spectrum for allocation for other uses. See Freeze News Release at 1-2. Recognizing that accomplishing these objectives would be difficult if new analog NTSC operations continued to be initiated without limitation, the Commission imposed a freeze on the filing of applications for new analog NTSC television stations. Id. at 3. The freeze becomes effective after the date 30 days after the date of publication of the Sixth FNPRM in the Federal Register. Id.

With reply comments in response to this NPRM not due until August 27, 1996, it is not likely that the Commission will be able to consider all matters in this proceeding and adopt an order adding Channel 60 to the table of allotments prior to the effective date of the freeze, such that interested parties may file applications for the new vacant allotment, even considering that the Sixth FNPRM has not been published in the Federal Register as of the date of filing of these Comments.

In the unlikely event that an order adding Channel 60 to the table of allotments is adopted prior to the effective date of the freeze, and even assuming for the sake of argument that an interested party files an application for that channel the next day, the following events must also occur prior to the effective date of the freeze: (i) the application must make its way from the

Commission's lockbox in Pittsburgh where it is required to be filed³ to the Commission's offices in Washington, D.C.; (ii) the application must undergo a preliminary review for acceptability⁴ and be placed on public notice as accepted for filing;⁵ and (iii) a period of not less than thirty days must be given for other interested parties to file competing, mutually exclusive applications⁶ which, as new applications, also could not be filed after the effective date of the freeze.

By our calculations, at the absolute minimum the Commission must allow competing applications to be filed as late as October 3, 1996, pursuant to the steps required under its own regulations. Therefore, if the Sixth FNPRM is published in the Federal Register as late as September 3, 1996, parties interested in filing competing applications would not receive the full thirty day period for filing mutually exclusive applications that is required by the Commission's regulations before being barred by the application filing freeze -- and that is with the absolute minimum schedule for the Commission to receive reply comments in this NPRM proceeding, consider and adopt an order adding the channel to the table of allotments the next day, the first application for the channel being filed the day after that, the application traveling from Pittsburgh to D.C. in one day, the application being reviewed by the Commission staff and being released on a public notice as accepted for filing one day after it arrives in Washington, and the minimum thirty days required by regulation being given for the filing of competing applications.

³ See 47 C.F.R. §§ 0.401(b), 73.3511.

⁴ See 47 C.F.R. § 73.3564(a).

⁵ See 47 U.S.C. § 309(b)(1); 47 C.F.R. §§ 73.3564(c), 73.3572(d).

⁶ See 47 C.F.R. §§ 73.3564(c), 73.3572(d).

Obviously, this process typically takes a longer time in the normal course of events, making it all the more likely that the application filing freeze would preclude the opportunity for the filing of the first application and/or competing applications, as required by law. Furthermore, since the very purpose of the freeze would be defeated by expedited action on the NPRM and/or expedited processing of the first application for the vacant allotment, such extraordinary measures should not be considered or adopted. Accordingly, the Commission's objectives in the Digital Television Proceeding would be best served, and the Commission's valuable resources would be best conserved, by the dismissal or denial of the Petition as moot or as not warranting consideration, and the termination of this NPRM proceeding without the allotment of Channel 60 to Mililani Town.

Wherefore, the above premises being considered, the Commission should dismiss or deny the Petition as moot or as not warranting consideration due to the freeze on new applications imposed in the Digital Television Proceeding, and terminate the above-captioned proceeding initiated with the NPRM without the allotment of Channel 60 to Mililani Town, Hawaii.

Respectfully submitted,
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August 12, 1996

CERTIFICATE OF SERVICE

I, Laura Ann Campbell, hereby certify that on this 12th day of August, 1996, copies of the foregoing "Comments in Opposition to Notice of Proposed Rule Making" have been served by first class mail, postage prepaid, or hand delivery upon the following:

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